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In the Supreme Court of the United States

OCTOBER TERM, 1997

THE DELAWARE RIVER AND BAY AUTHORITY,

Petitioner,

-v.-

INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 68, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF *AMICUS CURIAE* OF THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Port Authority of New York and New Jersey (Port Authority), like petitioner Delaware River Bay Authority (DRBA), is a joint governmental agency of two States created

[1] Counsel for the Port Authority authored this brief in whole and no monetary contribution was made by any other person or entity for its preparation or submission.

by Compact. The States of New York and New Jersey created the Port Authority through a Compact, dated April 30, 1921, that was consented to by the Congress of the United States. The Compact pledged the cooperation of the two States and recognized that better coordination of terminal, transportation and other facilities of commerce in the Port of New York would benefit the nation as well as the States. The Port Authority by Compact was given the full power and authority to purchase, construct, lease and/or operate transportation facilities.

The Port District comprises an area of about 1,500 square miles centering around New York harbor. The Port District includes the Cities of New York and Yonkers in New York State, and the Cities of Newark, Jersey City, Bayonne, Hoboken and Elizabeth in the State of New Jersey and over 200 other municipalities, including all or part of seventeen counties in the two States. The Port Authority's facilities include two tunnels and four bridges between the States of New York and New Jersey, an electric rapid transit system, the Port Authority Bus Terminal, the Trans-Hudson ferry service, the Port Authority Bus Programs, four airports, a heliport, the World Trade Center, the Newark Legal Center and Communications Center, six marine terminals, a railroad freight facility, five industrial development facilities, a resource recovery facility, and several regional development facilities, in the Port District.

The Port Authority respectfully urges the Court to grant the DRBA's Petition for Certiorari to review the decision of the New Jersey Supreme Court because that decision ignores the carefully considered methods set forth in the DRBA Compact for imposing duties and obligations on the bi-state agency and establishes a precedent that conflicts with the decisions of the highest court of other states and is harmful to other Compact Clause entities by imposing duties and obligations by inference.

SUMMARY OF ARGUMENT

Because of the unique role of Compact Clause entities in resolving regional problems through cooperation of the compacting States, most Compacts recognize the principal that additional duties and obligations may be imposed on the Compact Clause entities only through legislation where the compacting States each expressly agree. The New Jersey Supreme Court's decision in this case ignores this important principle by imposing an obligation on the DRBA that the Court inferred from "complementary or parallel" laws of New Jersey and Delaware that did not expressly apply to the DRBA or supplement the DRBA Compact.

The New York Court of Appeals refused to apply similar laws of New York and New Jersey to the Waterfront Commission of New York Harbor, a Compact Clause entity, because of the absence of an express agreement between the States that such laws applied to the Waterfront Commission or amended its Compact, *Malverty v. Waterfront Comm'n. of N.Y. Harbor*, 71 N.Y. 2d. 1977;529 N.Y.S. 2d 67; 524 N.E. 2d 421 (1988). The conflict between the New Jersey Supreme Court in the instant case and the New York Court of Appeals in *Malverty* will lead to New Jersey Court's imposing a myriad of additional duties on entities created by a bi-state Compact to which New Jersey is a party that were never considered or intended by the compacting states, thus leading to "discord and a destruction of the purposes for which... bi-state agencies are formed." App. 20a (internal quotation marks omitted).

ARGUMENT

THE PETITION SHOULD BE GRANTED BECAUSE THE NEW JERSEY SUPREME COURT IGNORED THE PROVISION OF THE DRBA COMPACT, COMMON TO MOST COMPACTS, THAT INSULATES THE DRBA FROM DUTIES AND OBLIGATIONS IMPOSED BY THE STATES' LEGISLATURES UNLESS BOTH STATES EXPRESSLY AGREE

This case raises a question of general public importance warranting discretionary review by this Court because the very purpose of establishing independent bi-state agencies under the Compact Clause of the United States Constitution would be compromised if they were subject to the myriad of duties and obligations imposed by "parallel and complementary" state laws.

As recognized by the United States Supreme Court in *Hess v. Port Authority Trans-Hudson Corporation,* 513 U.S. 30, 34, 115 S. Ct. 394, 400 (1994), bi-state entities are created "to address interests and problems that do not coincide nicely either with the national boundaries or with State lines—interests that may be badly served or not served at all by the ordinary channels of National or State political action" (citations and quotation marks omitted). In order to accomplish the mission of resolving regional problems, most bi-state Compacts provide for the independence of the bi-state entity from duties or obligations imposed by single state legislation unless the compacting States expressly agree. This represents an effort by the parent states to resolve such problems by mutual concession. *See, West Virginia ex rel. Dyer v. Sims,* 341 U.S. 22, 27 (1951). Imposing duties and obligations on a bi-state agency when neither legislature

debated or expressly agreed to impose such duties or obligations on the bi-state agency would destroy the cooperative nature of the undertaking of the parent states. *See Bell v. Bell,* 83 N.J. 417, 424 (1980). ("To sanction [unilateral state regulation of a bi-state entity] would lead to discord and a destruction of the purposes for which such bi-state agencies are formed", quoting *Del. Riv. & Bay Auth. v. Pub. Emp. Rel. Com.,* 112 N.J. Super. 160, 165-166 (App. Div. 1970), *aff'd* o.b., 58 N.J. 388 (1971).

In the instant matter, the New Jersey Supreme court ignored the provisions of the Compact between New Jersey and Delaware that insulates the DRBA from duties and obligations imposed by State law unless both States expressly agree. This provision states:

> For the purpose of effectuating the authorized purposes of the authority, additional powers may be granted to the authority by legislation of either State without the concurrence of the other, and may be exercised within such State, or may be granted to the authority by Congress and exercised by it; *but no additional duties or obligations shall be undertaken by the authority under the law of either State or of Congress without authorization by the law of both States.*

The highest Court of New York has rejected the proposition that similar laws of the compacting States can impose obligations on a Compact Clause entity. Rather, the Court recognized the necessity of concurrent legislation made expressly applicable to the bi-state entity before obligations could be imposed on a bi-state entity. In *Malverty v. Waterfront Comm'n of N.Y. Harbor,* 71 N.Y. 2d 977; 529 N.Y.S. 2d 67; 524 N.E. 2d 421 (Ct. App. 1988), the Court of Appeals in New York held that Article 23-A of the

Correction Law of the State of New York, prohibiting discrimination against persons previously convicted of a criminal offense, was inapplicable to the Waterfront Commission of New York Harbor, a bi-state entity of New York and New Jersey. The Waterfront Commission's Compact provides that the Commission "shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the Legislature of either State concurred in by the Legislature of the other". N.J.S.A. 32:23-10 (West 1990); N.Y. Unconsol. Laws §9811 (McKinneys 1979). The Court stated:

> New York and New Jersey have agreed, and Congress has authorized the two States, to amend and supplement the Interstate Compact, to implement the purposes thereof, by legislative action of either State concurred in by legislative action of the other State (McKinney's Unconsol. Laws of N.Y. §9870).

Id. at 980; 529 N.Y.S. 2d68.

In considering whether the New York Legislature intended that its unilateral legislation be applicable to the Waterfront Commission, the Court stated:

> In the past, the New York Legislature has expressly stated that certain legislation was amending a certain portion of the "Compact" and that the new law would take effect upon enactment into law by New Jersey of legislation having an effect identical to New York's legislation, unless New Jersey had already done so, in which case the amendment would take effect immediately.

Id., 529 N.Y.S.2d 68.

The Court found that the absence of any reference to the Waterfront Commission in the legislative history or text of article 23-A of the Correction Law, coupled with the absence of an express statement that the Legislature was amending or supplementing the provisions of the Compact between the states, indicated that the New York Legislature never intended article 23-A to apply to the Waterfront Commission. The Court found it irrelevant that New Jersey had enacted a similar statute prohibiting discrimination of persons convicted of crimes (which was "parallel or complementary"). In a quote applicable to the instant matter, the Court stated:

> That the two States have evinced the same, or similar, public policy regarding employment opportunities for former inmates by enacting similar "anti-discrimination" laws *(see,* N.J. Stat Annot. §2A:168A-1 *et seq.* ["Rehabilitated Convicted Offenders Act"]) is not sufficient under the express terms of the "Compact" to render it properly amended or supplemented such that the Commission would be subject to the provisions of article 23-A.

Id., 529 N.Y.S.2d. 68.

The New Jersey Supreme Court departed from sound reasoning of *Malverty* when it imposed a duty on the DRBA that it inferred from "parallel and complementary" state laws of New Jersey and Delaware. By doing so it eliminated much of the insulation Compact Clause entities were intended to have from the State political processes that has proven to be vital to solving regional problems. This will lead to reducing the effectiveness with which Compact Clause entities deal with regional problems. It also creates uncertainly as to what laws

apply to Compact Clause entities, especially in New Jersey and will ultimately lead to discord between compacting states regarding what laws apply to the bi-state entities created by those states. Accordingly we respectfully request that the petition be granted.

CONCLUSION

For the foregoing reasons, *Amicus Curiae,* Port Authority of New York and New Jersey respectfully requests that the Court grant the DRBA's Petition for Certiorari.

Respectfully submitted,

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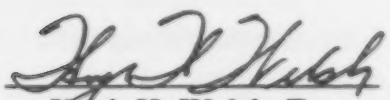
By: 
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Dated: August 21, 1997

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